Newsletter of the Utah Prosecution Council

The PROSECUTOR

RECENT CASES

United States Supreme Court

Law Enforcement Proviso Waiver Extended

Petitioner sued the United States under the Federal Torts Claims Act (FTCA) alleging negligence, assault and battery by correctional officers. The FTCA waives the Government's sovereign immunity from tort suits, but excepts from that waiver certain intentional torts. Petitioner claimed he was forced to perform oral sex on a correctional officer while other officers held him and served as lookouts. He claimed the officers threatened to kill him if he did not comply and that he suffered physical injuries as a result of the incident.

The government argued the FTCA did not waive the U.S.'s sovereign immunity from suit on petitioner's intentional tort claims because the claims fall within the intentional tort exception. The government argued the law enforcement proviso did not save petitioner's claims because it only protects the government when the tortious conduct occurred during the course of executing a search, seizure or arrest.

The U.S. Supreme Court held the text of the statute shows congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority. The Supreme Court held, the government's immunity is waived under the proviso when law enforcement is acting within the scope of their employment " regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." The Supreme Court reversed the judgment of the appellate court. *Millbrook v. United States*, U.S., No. 11-10362, 3/27/13

Petitioner Guaranteed Counsel To Draft Motion

Petitioner claims the government denied him his Sixth Amendment right to counsel when the court denied his request for counsel to help him draft a motion for a new trial. Petitioner had previously had counsel appointed and surrendered his right to counsel twice. Petitioner had proceeded through his trial *pro se* and been convicted of making criminal threats, assault with a firearm and being a felon in possession of a firearm and ammunition. The trial court denied petitioner's request to be appointed counsel citing his vacillating between counsel and self-representation and because petitioner did not provide any reasons why the court should grant his request for counsel. The Appellate Court of California held, viewing all the circumstances as a whole, the trial court did not abuse its discretion in denying the request for counsel.

The U.S. Court of Appeals for the Ninth Circuit held the California appellate court

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violated petitioner's Sixth Amendment right when they denied him the right to counsel at a critical stage of the prosecution. The U.S. Supreme Court held, "in light of the tension between…the right to counsel at all critical stages of the criminal process and its concurrent promise of a constitutional right to proceed without counsel" a defendant is allowed to waive his right to counsel. The Supreme Court reversed the Ninth Circuit judgment and remanded the case. *Marshall v. Rodgers*, U.S., No. 12-382, 4/1/13

Warrantless Blood Test For DUI Not Always Allowed

Defendant was stopped after his truck was observed speeding and repeatedly crossing the centerline. Upon investigation, the officer suspected defendant to be intoxicated and defendant told the officer he had drank "a couple of beers" that night. Defendant failed the field-sobriety tests and declined the use of a breath-test before being arrested. While on the way to the police station defendant told the officer he would again refuse to provide a breath sample, so the officer took him directly to the hospital for a blood test.

The officer did not attempt to secure a warrant for blood testing, but did read defendant a standard implied consent form, explained that refusal to submit to a blood test would lead to the revocation of defendant's license and could be used against him during prosecution. Defendant refused to voluntarily submit to the blood test and the officer ordered the test. The test revealed defendant had a blood alcohol concentration of .154 percent. He was charged with a DWI and moved to supress the blood test arguing it was taken in violation of his Fourth Amendment rights. The trial court supressed the evidence holding the exigency exception did not apply because there was enough time to obtain a warrant.

The Missouri Supreme Court affirmed and the U.S. Supreme Court granted certiorari to resolve a split of authority on whether the natural dissipation of alcohol in the bloodstream established a *per se* exigency which justifies an exception to the warrant requirement for non-consensual blood testing. The Supreme Court held, "While the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case…it does not do so categorically." The Supreme Court held a warrantless blood test must be deemed reasonable case by case. The Supreme Court affirmed the Missouri Supreme Court's decision and vacated the conviction. *Missouri v. McNeely*, U.S., No. 11-1425, 4/17/13

Some Drug Convictions Not an Aggravated Felony For Immigration Purposes

Petitioner was a Jamaican citizen who came to the U.S. legally in 1984. During a traffic stop in 2007 he was found with 1.3 grams of marijuana in his car. Petitioner pled guilty to possession of marijuana with intent to distribute and was required to complete five years of probation. No judgment of conviction was entered and after the five years his charge would be expunged. However, under the Immigration and Nationality Act (INA) petitioner was determined to be guilty of an "aggravated felony" and ordered to be deported. Petitioner appealed and the Supreme Court granted Certiorari.

The INA requires a noncitizen who has been convicted of an aggravated felony to be deported and prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling the case. The INA definition of "aggravated felony" includes "illicit trafficking in a controlled substance." Under a string of definitions and statutes, an conviction under the Controlled Substances Act which is punishable by more than one year's imprisonment will be considered an "aggravated felony for a non-citizen's immigration status.

The U.S. Supreme Court held the sharing of a small amount of marijuana "does not fit easily into the 'everyday understanding' of "trafficking," which "ordinarily…means some sort of commercial dealing." The court held, "If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA." The court reversed the court of appeals and remanded the case. *Moncrieffe v. Holder*, U.S., No. 11-702, 4/23/13

Utah Supreme Court

Defense Of A Third Person Requires Imminent Danger

Defendant was called by a friend, Rachel, and told her boyfriend had been hurting her and asked defendant to come over and help. After the phone call, Rachel and her boyfriend left the house, picked up Rachel's younger brother and returned home. Defendant was at the house when Rachel and her boyfriend returned home. Defendant confronted the victim verbally and then swung a knife at him, cutting his arm. While this confrontation was happening Rachel was fifteen feet away and was not involved in the altercation.

Defendant was convicted of aggravated assault. At trial, defendant moved to have a jury instruction concerning defense of a third person. The trial court found the evidence did not support a theory of defense of a third person and refused to

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LEGAL BRIEFS

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give a jury instruction about it. Defendant appealed his conviction for aggravated assault arguing the court's refusal to give the jury instruction was an error.

The Utah Supreme Court held the facts showed defendant "could not have reasonably believed that Rachel was in imminent danger" when he stabbed the victim because she was not involved in the altercation at all. The supreme court held defense of a third person requires the third person be in imminent danger and affirmed the conviction. *State v. Berriel* 2013 UT 19

Topless Photo Not Prejudicial

Defendant was an in-school suspension (ISS) aide at West Jordan Middle School. M.M. was assigned to ISS while defendant was working . While, M.M. was in ISS, defendant put a cell phone on his desk showing him a photo of her uncovered breasts, put her hand in his pants, rubbed his penis and performed oral sex. The next summer, M.M. called defendant from D.P.'s cell phone and they agreed to hang out. Defendant sent a topless photo to D.P.'s cell phone, then drove the boys to a park in her car. While at the park, defendant touched the boy's penises, performed oral sex on D.P. and had sexual intercourse with M.M.

Defendant was convicted of rape, three counts of forcible sodomy and three counts of forcible sexual abuse. After the trial, defendant moved for a new trial on the grounds that an unrelated topless photo was improperly admitted into evidence and there were several other errors. The trial court found that because of the many errors defendant was denied her constitutional right to a fair trial and granted a new trial.

The Utah Supreme Court held the errors and irregularities that occurred at trial were not prejudicial enough to warrant an arrest of judgment. The supreme court held errors require reversal only if the court's confidence in the jury's verdict is undermined. Here, the supreme court held there was enough evidence for the court to have confidence in the jury's verdict. The supreme court vacated the order granting a new trial and the jury verdict was reinstated. *State v. Billingsley* 2013 UT 17

Group Has Standing As Claims Have Great Constitutional Importance

The Utah State Legislature enacted Senate Bill 2, which reformed education programs and funding. A group of current and former legislators brought suit claiming the Bill was unconstitutional in four respects. The first two claims fall under Article VI of the Utah Constitution, claiming the Bill violates Section 22 because it violated the single-subject rule and the subject was not clearly expressed in its title. The other two claims fall under Article X of the Utah Constitution, arguing the Bill violates Section 3 because entities other than the State Board of Education are given rights to make decisions about the public education system. The district court granted Appellee's motion to dismiss the Article VI claims for failure to state a claim and a motion for summary judgment on the Article X claims.

On appeal, the Utah Supreme Court held appellant did not have traditional standing, but did have standing to bring the Article VI claims under the alternative doctrine of public-interest standing because the claims rose to the level of "great constitutional importance" and the appellants were appropriately situated to raise them. The supreme court held appellants did not have standing on the Article X claims because the claims did not rise to the level of great constitutional importance and appellants were not appropriately situated to raise them. *Gregory v. Shurtleff* 2013 UT 18

Utah Court of Appeals

Refusal To Consent Is Not Affected By Lack of Warrant

A trooper stopped Assmann for speeding and could smell a strong odor of alcohol on Assmann's breath. The trooper also noticed Assmann's speech was slurred and his eyes were bloodshot and glassy. The trooper had Assmann perform field sobriety tests and a preliminary breath test, which showed the presence of alcohol.

Assmann was placed under arrest and the trooper requested he submit to a blood test. The trooper then read the blood test admonitions verbatim off the DUI Report Form and asked Assmann for a response to his request. Assmann responed "Nope." The trooper then read the admonition verbatim off the same form and informed Assmann his driving privilege could be revoked for refusing, the trooper requested the blood test again and Assmann again responded, "No." The trooper then obtained a warrant for Assmann's blood and the test was performed.

Shane Assmann's driver license was revoked for a period of thirty-six months by the Driver License Division. The district court affirmed the administrative revocation.

On appeal, Assmann claimed the district court erred because the warrant used to obtain his blood was never produced at trial and the evidence was insufficient to support Assman was read the refusal admonitions or that he actually refused to submit to the chemical test.

The appellate court held the warrant was not relevant to issue of refusal to consent to a chemical test and the district court's findings were supported by substantial evidence. The appellate court affirmed the decision upholding the revocation of

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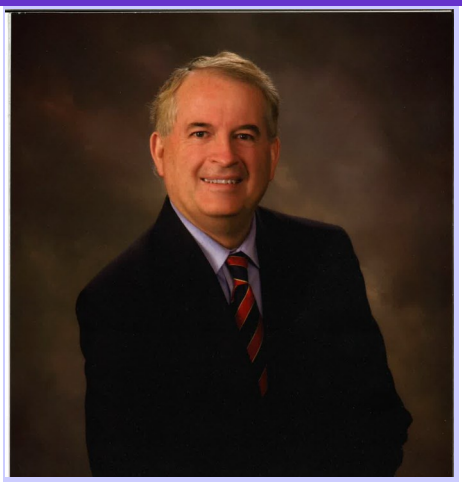
PROSECUTOR PROFILE



Dave Shawcroft
Deputy Utah County Attorney

Dave grew up in southern Colorado near the headwaters of the Rio Grande River and not far from the Great Sand Dunes National Monument. His first job was on his family's cattle ranch near Alamosa, Colorado, almost within sight of Taos, New Mexico. Later, he worked at the local bowling alley while attending BYU. As a child he wanted to continue the family ranching business when he grew up. However, after a few years on a tractor (before comfy air conditioned cabs were the norm), and a few Colorado winters on a trusted horse (where comfy air conditioned cabs are still not the norm), he decided to try a career change. When the weather outside is beautiful, he seriously questions the change of career choice.

After graduating from BYU with a Bachelor of Science in Animal Science, Dave went back to BYU for his J.D. and graduated in 1983. He met his wife, Harriet Smurthwaite, while at school. He says they met "at the Utah Valley Hospital, where I was recovering from an illness which I had contracted in Mexico." She came to visit with a church group and apparently she was impressed enough with his yellow patina and feverish glow to go on a date. They have been married for almost 40 years and are the parents of seven children, with 15 grandchildren (soon to be 18).

After 10 years in private practice, and very much enjoying the municipal civil work which he had been doing, he decided to accept his current position in the Civil Division of the Utah County Attorney's Office. He has now been at the Utah County Attorney's Office for 18 years. He has enjoyed, and continues to enjoy, doing the County civil work which comes his way. However, telling people "No" has always been difficult, and it seems that quite often "No" is the required response. Dave finds the job rewarding when a way can be found to assist a deserving individual through the bureaucratic maze.

Dave's advice for civil attorneys is "enjoy the work and also enjoy life. Leave the office at the office when you walk out the door (not always possible, but a good goal)." He also says, "It is a pleasure to work with the professional and pleasant individuals in the Utah County Attorney's Office, as well as the other County officials and employees."

Quick Facts

Born: Monte Vista, CO

Law School: BYU

Favorite TV series: West Wing (Even better the second time around thanks to Netflix)

Favorite Book: "April 1865: The Month That Saved America," by Jay Winik

Favorite Sports Team: The Cougars of BYU. Are there other teams?

Favorite Quote: Get it done, so you can quit worrying about it.

Ideal Vacation Destination: Any place warm in the winter.

Pet: A cat named Tiger

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Assmann's driver license. *Assmann v. State* 2013 UT App 81

Brief Detention and Transportation of Suspect Permissible

Defendant was convicted of driving under the influence resulting in serious bodily injury to another. Defendant drove the wrong direction and hit a car head-on. The police officer on the scene observed the defendant's speech was slurred, slow and deliberate, and she smelled of alcohol. The officer asked defendant to perform field sobriety tests and she agreed. However, the officer became concerned about having defendant perform the tests where they were standing because a snowstorm had become very severe. The officer considered multiple locations, but determined the police station was the best. He asked defendant if she would agree to move there to perform the tests. She agreed and the officer informed her she was not under arrest and had her ride in his police car for about 90 seconds.

When they arrived at the station, the officer had her perform the tests in the parking garage and she failed. She was then placed under arrest. Defendant moved to suppress the results of the test, but the motion was denied because the trial court found the transportation "did not exceed the permissible scope of an investigative detention under all circumstances."

On appeal, defendant argued prolonging her detention was impermissible and the motion to suppress should have been granted. The appellate court held, "The brief further detention of defendant to facilitate field sobriety testing was permissible" under the circumstances. The court further explained, "Under all the circumstances, including defendant's express consent, it was reasonable to prolong her detention for a few more minutes to administer field sobriety test in order to confirm or dispel that suspicion and to do so in a more appropriate setting than the snowy roadside." *State v. Beckstrom* 2013 UT App 104

Failure to Make Token Payments Was Willful Violation of Probation

Defendant plead guilty to one count of communications fraud and one count of racketeering and was placed on probation. A condition of his probation was to pay restitution of $479,123.13 to his victims. After a year of probation the State filed a motion for an order to show cause, arguing defendant violated the terms of his probation by failing to pay any restitution.

During the hearing, defendant admitted to violating his probation by failing to pay any restitution. The trial court found defendant's mitigating evidence failed to show he had made a good faith effort to pay any restitution. The court revoked his probation and reinstated his prison sentence.

On appeal, defendant argued the trial court abused its discretion by failing to explicitly find that his probation violation was willful and failing to consider alternative means of punishment. In the alternative, defendant argues the hearing did not meet the minimum requirements of due process.

The appellate court held defendant willfully violated his probation because he did not make token payments. The appellate court further held the trial court's explicit finding of willfulness was not necessary and therefore considerations of alternative punishments were not required. Also, the appellate court held the hearing satisfied due process because defendant was given the opportunity to speak and offer evidence at his hearing The appellate court affirmed the trial court's revocation of defendant's probation. *State v. Brady* 2013 UT App 102

Unanswered Request for Admissions Are Deemed Admitted

Discover Bank initiated a collection action against Kendall. Then, Kendall served interrogatories, requests for admissions, and a request for production of documents on Discover Bank. Kendall's request included, "Admit that Kevin E. Kendall has paid off the account that you allege he owes money on, and that he has fulfilled all of his contractual obligation to you." Discover Bank did not respond within the twenty-eight day time limit set in Rule 36 of the Utah Rules of Civil Procedure. Kendall then served Discover Bank with a motion to compel discovery and a Rule 37 (a) letter, attempting in good faith to confer with and obtain a response from Discover Bank. After no response, Kendall served Discover Bank with a motion for summary judgment on the grounds that all admissions were considered admitted because of the lack of response.

After Discover Bank received the motion for summary judgment, they served Kendall with its discovery response and on the same day provided a response to Kendall's motion for summary judgment. The response stated, "Kendall's motion is moot. Discover Bank has sent its discovery responses to counsel for Kendall on this day. Therefore, there is no relief for the Court to grant and the Motion should be dismissed."

Discover Bank then filed its own motion for summary judgment presenting evidence disputing that Kendall had paid the amount due. The district court granted summary judgment in favor of Discover Bank and entered judgment for Discover Bank.

Kendall appealed the district court's grant of Discover Bank's motion for summary judgment, arguing Kendall's requests for admissions should have been deemed

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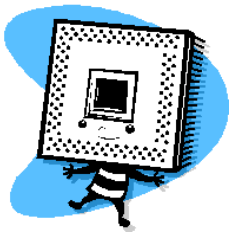
admitted because Discover Bank did not respond to the requests within twenty-eight days and the matters deemed admitted were conclusively established as true because Discover Bank never moved to amend or withdraw the admissions.

The appellate court agreed and reversed the district court's grant of summary judgment in favor of Discover Bank. The appellate court held Rule 36(b)(1) states, "facts contained within requests for admissions are deemed admitted when they are not answered within the time prescribed."

The appellate court held because Discover Bank admitted it was late responding to Kendall's requests, never requested an extension of time, never objected to the form of Kendall's requests and never filed a motion to withdraw or amend the admissions, Kendall's admissions were admitted as evidence. The appellate court held the district court's grant of summary judgment to Discover Bank was an error and reversed the judgment. *Discover Bank v. Kendall* 2013 UT App 87

Juror Impermissibly Pressured By Instruction



Ginter started an organization called Patriot Money Gifting Program (PMGP) with the intent to create an alternative monetary system. Ginter established PMGP out of concern for people's souls because he believed the Federal Reserve and Internal Revenue Service were criminal organizations with the intent to create a cash-less society. Ginter believed the Book of Revelation predicts microchips will be implanted into everyone in the cash-less society and these microchips are "the mark of the beast, and those who will take the mark of the beast will definitely lose their souls."

Ginter promoted his beliefs and recruited Samuel Vonn Harris. Ginter told Harris he only needed to invest $2 and he would receive a $250,000 house. However, Harris invested $105,975, let Ginter live in his house for five years and only received $3,000 in return.

Ginter was charged with communications fraud and organizing a pyramid scheme. During jury deliberations, the jury was given dinner order forms with the intent of implicitly communicating the jury was not going to be let go without a decision. Two hours after the dinner order forms were delivered, the jury sent a note to the court stating they were are at a 7-1 split and had been since entering the jury room.

The trial court called the jury back into the court room, over defense counsel's objections, and read the jury a modified *Allen* instruction (Instruction 46) and Very shortly afterwards, the jury returned with a guilty verdict on both counts. On appeal, Ginter argued he was deprived due process and a fair trial because Instruction 46 impermissibly pressured the lone holdout juror to acquiesce to the majority's position.

The court of appeals held *Allen* instructions are only deemed coercive if: 1) the language of the supplemental charge can properly be said to be coercive; and 2) it is coercive under the specific circumstances of the case.

Ginter presented *State v. Harry* as binding precedent and the appellate court agreed. The court of appeals held Instruction 46 was coercive because the differences between *Harry* and Ginter's case were not significant enough to distinguish the cases from each other and preclude the otherwise mandatory application of *Harry*. The appellate court reversed and remanded the case for further proceedings. *State v. Ginter* 2013 UT App 92

Attorney Allowed to Interpret Facts Differently Than Client

Defendant was incarcerated and served part of his 45-day sentence. During this time he was granted work release privileges which allowed him to leave the jail during the day and return at night. Defendant determined his sentence was reduced because of good time served and came to the conclusion he would released on July 4th, 2008. He spoke to jail personal and they did not have any records corroborating this conclusion. On July 4th, 2008 no jail personal ever told him he was free to leave and not return, but he was released on his normal work release conditions. However, he did not return as required that evening and was arrested on September 4, 2008 and was convicted of escape, a third degree felony.

He appealed claiming ineffective assistance and plain error. He claimed his trial counsel failed to discover and introduce potentially exculpatory documents, where defendant showed the mathematical reasons he was to be released early.

The Utah Court of Appeals held, counsel must "adequately investigate the underlying facts of a case in order to formulate the basis for an acceptable trial strategy," but counsel does not need to "interpret those underlying facts exactly as his client does" when handling the case. The appellate court affirmed the conviction holding defendant did not demonstrate deficient performance and prejudice as required by *Strickland v. Washington*. *State v. Graham* 2013 UT App 72

Failure to Sever Charges Not Ineffective Counsel

Defendant was convicted of various first degree charges of sexual abuse of a child. On appeal defendant asserted ineffective

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On the Lighter Side

As May is the month of Mother's Day here are some Un-motherly stories:

French Kissing Son to Pass Drugs

A mom lovingly visited her son while he was in a jail in Yates County, New York. Apparently, the visit became too lovingly as the mother french kissed her 30-year- old son. The loving kiss drew the suspicions of the guards, who checked the mouth of the son afterwards. The guards were correct to be leery of the mother son couple's kiss because they found two Oxycodone pills in his mouth. While it was strange enough that the mother kissed her son with an open mouth, I'm sure moving the pills to her son took some extra tongue work that grossed out the guards. http://www.nydailynews.com/news/crime/mom-passed-son-drugs-french-kiss-article-1.1257669

Inking Her Daughter

This mother decided it was a good idea to put a heart on her daughter's shoulder—permanently. Her daughter of 11 years allegedly requested a heart tattoo and her mom accommodated her. The mother was a tattoo-artist in North Carolina when she was arrested for tattooing a person under the age of 18. Supposedly, police were tipped off by one of the mom's in-laws who was not happy with her for unrelated reasons. The mother claims the daughter asked for the body art and insists the young girl did not feel any pain. The mom stated, "I didn't fill it in." That statement didn't change the minds of the police who charged the woman with a Class 2 misdemeanor. http://shine.yahoo.com/parenting/mom-arrested-giving-her-11-old-tattoo-194700542.html

Disneyland for the 1%

Rich mom's have reportedly been paying disabled children to cut the lines at Disneyland. Supposedly these moms have been paying "black market tour guides" about $130 an hour or more than $1,000 a day. Disney was not pleased with the news and stated, ""It is unacceptable to abuse accommodations that were designed for guests with disabilities."

However, some feel these moms aren't doing anything wrong. They state that they are paying a disabled kid good money to go to Disneyland with their family for a day. However, these accommodations were meant to server legitimately disabled people and ensure they don't face discrimination in public places. http://www.nypost.com/p/news/local/manhattan/disney_world_srich_kid_outrage_zTBA0xrvZRkIVc1zItXGDP

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assistance of counsel claiming his counsel failed to obtain forensics examination of the victims, failed to move to sever the charges based on individual victims and failed to object to testimony about prior bad acts.

The appellate court held defendant could not establish counsel performed ineffectively concerning the failure to obtain forensic examinations. The court held defendant did not show these examinations would produce any relevant evidence because there was years between the abuse and the trial.

The appellate court also held counsel was not ineffective for failing to sever the charges. The court held the crimes were properly joined as a common scheme or plan, there was a clear connection between the crimes and defendant failed to argue why "the motion to sever should have been granted." The appellate court affirmed the convictions and rejected defendant's claim of ineffective assistance of counsel. *State v. Jimenez* 2013 UT App 76

Statute Implies Required Mental State

An officer arrived at defendant's house responding to a call for possible domestic dispute and public disturbance. When the officer approached the front door of the house, defendant was standing inside the screen porch and refused to unlock the screen door. Eventually, the officers called out to defendant and his girlfriend to try to convince them to come out of the porch and speak to them.

Defendant responded by referring to a gun and telling the officers they were "fair game" if they tried to enter his house. Defendant's girlfriend eventually agreed to speak with the officers outside and unlocked the screen door and exited. When she exited, defendant went in to the house. Officers followed defendant, worried he was going to retrieve the gun he mentioned. Officers kicked in the front door and found defendant pointing a rifle at the officers. Officers opened fire on defendant as he started to raise the rifle.

At trial, the court instructed the jury on the elements of aggravated assault and included an instruction requiring only a reckless mental state for conviction. Defendant was convicted of three counts of aggravated assault. Defendant appealed claiming the trial court erred when it instructed the jury only a reckless mental state was required for conviction.

The appellate court held if a statute does not specify a culpable mental state for a crime, "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Here, the statute did not specify a culpable mental state for aggravated assault and so the appellate court held the instruction was not an error. The appellate court affirmed the conviction. *State v. Loeffel* 2013 UT App 85

Actions Allow Inference About Intent

Defendant was convicted of burglary of a vehicle after breaking into a UTA bus and stealing transfer slips. Defendant appealed arguing there was insufficient evident to support the conviction.

The appellate court held the evidence showed no one gave defendant permission to enter the bus and he entered the bus unlawfully. Defendant argued there was insufficient evidence to prove he entered the bus with the intent to commit a felony or theft. The appellate court held, "Intent may be inferred from conduct and attendant circumstances." Here, the appellate court held defendant's actions, entering the bus and crouching down in the area where transfer slips were found and offering multiple explanations for why he entered the bus, showed he entered the bus with the intent to commit a felony or theft. The appellate court upheld the conviction. *State v. Menke* 2013 UT App 75

"Dangerous Weapon" Defined

Defendant tried to board a trax train with a shopping cart, but was stopped by the train operator. The operator thought defendant was intoxicated and radioed his supervisor. Both of the men tried to convince defendant to move to the sidewalk, for safety reasons. Soon defendant started swearing a lot and the supervisor threatened to call the police. Defendant talked about a knife and gun and that he would kill the supervisor. Defendant was arrested and found with a knife on his person. Defendant was convicted of possession of a dangerous weapon by a restricted person.

Defendant appealed arguing the evidence was insufficient to support the jury's guilty verdict. Specifically, he argued the evidence was insufficient to show the knife he possessed was a dangerous weapon according to the statute.

The legislator defined dangerous weapon as "an item that in the manner of its use or intended use is capable of causing death or serious bodily injury." The appellate court held there are four factors for determining what is a dangerous weapon. The factors are:

- the character of the instrument, object, or thing;
- the character of the wound produced, if any
- the manner in which the instrument, object, or thing was used; and
- The other lawful purposes for which the instrument, object, or thing may be used.

The appellate court held defendant's knife was a dangerous weapon because of the

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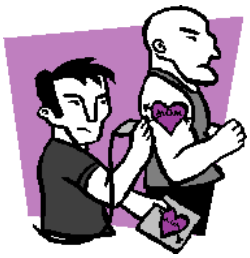
character of the instrument and the manner in which it was used. The appellate court upheld the conviction. *State v. Miles* 2013 UT App 77

Tattoos On Defendant's Face Not Evidence



Before trial, defendant moved to be able to cover the tattoos on his face and the trial court denied the motion. Defendant was convicted for aggravated robbery. Defendant appealed claiming he was unfairly prejudiced by the trial court's denial of his motion for permission to cover his facial tattoos at trial. He claimed the tattoos were inadmissible under Utah Rules of Evidence because the tattoos were irrelevant and unfairly prejudicial.

The appellate court held the tattoos were not subject to rules of evidence because they did not relate to any alleged fact at issue, but were instead merely visible on defendant's face during the trial. The appellate court rejected defendant's arguments and affirmed his conviction. *State v. Ortiz* 2013 UT App 100

Holding Knife Considered Using Dangerous Weapon

Defendant appealed his convictions of aggravated robbery and criminal trespass, claiming the evidence was insufficient to convict him on the aggravated robbery charge because the evidence did not establish he "used" a dangerous weapon.

Defendant did concede that a knife was in his hand at the time of the robbery, but argues the term "use" required "a more active employment." The appellate court held there was sufficient evidence to convict defendant because it was shown he approached the victim with his face concealed and a knife visible in his hand when he told her to give him her purse. Defendant's conviction was affirmed. *State v. Powell* 2013 UT App 64

Single Criminal Episode Does Not Apply to Unit of Prosecution

The victim was outside his house in the early hours of November 1, 2007 when a white Honda Civic drove past, made a U-turn and circled back towards his house. The victim then heard a gunshot fired from the car, so he ducked inside the house. He then heard eight or nine more shots hit his home. The car left and then came back a few minutes later and two more shots were fired at his home.

Police arrived within minutes and while at the house saw defendants, Rasabout and Kaykeo, drive by in a white Honda Civic. When the Honda was pulled over the officer saw shell casings in plain view and noticed defendants appeared to be intoxicated. When the car was impounded, the police found a nine-millimeter semiautomatic handgun with an empty magazine and more shell casings in the car.

Defendants were convicted of possession of alcohol by a minor and twelve counts of discharge of a firearm from a vehicle. Before sentencing, the trial court granted a motion to merge the convictions, from twelve counts each to only one count each.

On appeal, the state argued the trial court erred by allowing the merger. Defendant claimed merger was correct because the single criminal episode statue applied. The State argued the single criminal episode statute protects defendants from having

multiple trials, but not from multiple counts at the same trial. The appellate court held the test is "what the legislature has determined to be the allowable unit of prosecution." The appellate court agreed with the State's argument and held the statute deems the allowable unit of prosecution to be one count for each time a defendant discharged a weapon. Here, the appellate court reversed the trial court and held defendant should be re-sentenced according to the twelve counts instead of one. *State v. Rasabout* 2013 UT App 71

Magistrate Does Not Need Attached Material For Warrant

Defendant entered conditional guilty pleas to four counts of voyeurism. The trial court denied defendant's motion to suppress. Defendant appealed the denial of his motion to suppress, claiming the affidavit for a search warrant was deficient because it did not attach the material that was believed to be pornographic for the review of the magistrate.

However, the appellate court had specifically rejected this argument in *State v. Moore*, where the appellate court concluded there is no requirement to attach the material. Rather the code requires the affidavit to provide a sufficiently detailed description. Here, the appellate court affirmed the conviction holding the description provided by the affidavit, digital photographs or videos of "male children exposing their genitals and/or posing in sexual positions," was sufficiently detailed. *State v. Stevens* 2013 UT App 90

Violation of Law Does not Require Conviction

Defendant was arrested in Layton City and charged with patronizing a prostitute. Defendant entered into a plea in abeyance agreement. Under the agreement,

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defendant plead no contest to the patronizing charge and the plea was held in abeyance for eighteen months upon the condition that he was to commit "no violations of law except for minor traffic offenses."

A few months later, defendant was charged with sexual solicitation, but entered into a diversion agreement with Sunset City. Then, Layton City filed a motion for an order to show cause in the district court claiming defendant violated the terms of his plea in abeyance and asking the court to enter a no contest plea for patronizing a prostitute.

The district court found defendant did not violate the terms of his plea in abeyance because he was not convicted of a crime. The district court held, "a violation of law must necessarily be a conviction and not merely an allegation of misconduct" and dismissed Layton City's motion for an order to show cause with prejudice.

Layton City appealed the district court's finding arguing the term "violation of the law" does not necessarily mean a conviction. The appellate court relied on Utah Code Ann. § 77-2a-4(2), which states "the termination of a plea in abeyance agreement…shall not bar any independent prosecution arising from any offense that constituted a violation of any term or condition of an agreement whereby the original plea was placed in abeyance."

The appellate court interpreted this to mean a court may determine there has been a violation of law, without a conviction being submitted. The appellate court held the term "no violations of law except for minor traffic violations" does not "require a conviction to support a violation of the agreement" and reversed the district court's dismissal of the patronizing a prostitute charged and remanded the case for an evidentiary hearing to determine if defendant did violate the law. *Layton City v. Stevenson* 2013 UT App 67

Failure to Appear Allowed Denial of Motion

Dike Williams appealed his convictions of three counts of securities fraud and the related order of restitution. Williams put forth many arguments for appeal, but failed to adequately brief most of them. The only issues the court considered on appeal were Williams' assertions that the trial court erred by denying his counsel's motion to withdraw and the restitution order should not have included amounts associated with legitimate investments.

During trial Williams informed his attorney he didn't want him as his attorney anymore. However, Williams failed to appear to the hearing where his attorney moved to withdraw and the court denied the motion.

On appeal, Williams argued the court violated his Sixth Amendment right to counsel by denying his counsel's motion to withdraw. The appellate court held Williams's absence justified the trial court denying the motion. Furthermore, the trial court was able to deny the motion because it was part of a series of tactics employed by Williams to delay the court proceedings.

Williams also challenged the trial court's restitution award claiming the amount should not have included a $250,000 investment from one of the victims because it was not connected to the crimes. The appellate court held, because Williams was not convicted of criminal activity and did not admit any wrong doing in connection with that investment, the repayment sums should be recalculated excluding that investment.

The appellate court remanded the case to the trial court for recalculation of the amount of restitution owed and affirmed his convictions. *State v. Williams* 2013 UT App 101

City Employee Appeal Board Exceeded Its Authority

Officer

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Gillespie was a police officer for the Taylorsville City Police Department (the Department). Gillespie was the subject of an excessive force disciplinary action and while appealing this action he was involved in a series of events which led to his termination. In the fall of 2010, Gillespie showed a pornographic video to fellow officers, while on duty and while off duty. Also, Gillespie, while very intoxicated, allegedly jumped on the hood of an on-duty officer's car, leaving a dent on the hood, while the officer was at Gillespie's home. Because of these incidents the Police Chief initiated an Internal Affairs (IA) investigation.

The IA investigator (the investigator) informed Gillespie he was to report for an interview about the incident when Gillespie was intoxicated. Before the interview Gillespie was informed of the Department's policy concerning telling the truth during the interview and his duty to respond to the investigator's questions.

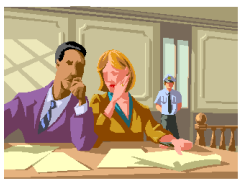
When asked about the intoxication incident Gillespie tried to mitigate his actions, but later was more truthful about being very intoxicated and standing on the car. The investigator also asked Gillespie about the pornographic video, which Gillespie initially denied. Gillespie then admitted to having the video on his phone and attempting to show it to other officers, but claimed the officers declined.

After the interview, the investigator reported there was substantial evidence Gillespie had damaged the patrol vehicle while intoxicated and had shown the pornographic video to other officers. The investigator also indicated that Gillespie had answered dishonestly during the interview and had violated department policy. The investigator recommended Gillespie receive a written warning for the intoxication incident, leave without pay for the pornography incident, and termination for lying during the IA investigation. Ultimately, Gillespie was terminated by the Police Chief because his credibility could be impeached if called to testify at trial. Also, the Chief reasoned he should be terminated for obstructing an IA investigation and damaging equipment.

Gillespie appealed and the Taylorsville City Employee Appeal Board reversed Gillespie's termination, finding: he did not violate policy by showing the pornography, any dishonesty related to the pornography was excusable because he was not notified it was part of the investigation and there was insufficient evidence showing Gillespie damaged the car. The City of Taylorsville appealed to the appellate court.

The court of appeals reviewed the Appeal Board's decision to determine if the Board "applied a more expansive standard of review than the substantial evidence standard." The city argued the Board erred in failing to afford any deference to the Department's interpretation of its own policies, abused its discretion in overturning the decision to terminate Gillespie, and erred by concluding Gillespie had a due process right to notice of the charges against him at the investigative stage.

The court of appeals held the Board exceeded its authority by adopting its own more expansive standard of review which allowed the Board to find Gillespie was not afforded sufficient notice. The court of appeals also set aside the Board's decision, remanding the case. *Taylorsville City v. Taylorsville City Employee Appeal Board* 2013 UT App 69



Tenth Circuit Court of Appeals

Change-of-Plea is Excludable For Purpose of Speedy Trial Act

Defendant was convicted of bank fraud after stealing checks from people's mail and altering the checks. He would then use the checks to make purchases and return the merchandise for cash. Prior to trial, defendant moved for dismissal based on violations of the Speedy Trial Act (STA), but the motion was denied. He appealed his conviction arguing the delay between his indictment and trial violated his rights under the (STA).

Defendant argues the district court erred by considering a change-of-plea a pre-trial motion. A pre-trial motion allows the days between the motion being filed and the hearing taking place to be excluded from the limit of seventy days allowed under the STA. The government argues the change-of-plea should be considered a pre-trial motion because it requires a hearing.

The U.S. Court of Appeals for the Tenth Circuit agreed with the First and 6th Circuits when holding a change-of-plea notice is a pre-trial motion. The court held a change-of-plea notice does not create extra work for the parties, but it does unsettle the expectations and consumes time in the same way a pre-trial motion does. The court held the eighteen days between the filing of the change-of-plea and the change-of-plea hearing are excludable under the STA. The court affirmed the district court's decision. *United States v. Loughrin*, 10th Cir., No. 11-4158, 3/8/13

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Other Circuits/ States

Identity Theft Conviction Upheld on Excessive Use of Authority

Defendant was the chief financial officer of the National City Christian Church (the church) in Washington, D.C. and stole $850,000 from the church through a line of credit. Defendant's position gave him access to digital versions of the signatures of at least four of the church's officers. He used these signatures to create a document approving an increase in the church's line of credit at Adams National Bank.

Defendant was charged and convicted of aggravated identity theft, bank and wire fraud, and many other offenses. Defendant appealed his convictions for aggravated identity theft arguing the government failed to provide sufficient evidence that he stole the church officers' identity and the officers suffered individual harm beyond that suffered by the church.

The U.S. Court of Appeals for the D.C. District held the statutory text only requires the use of the information "in excess of the authority granted" to someone. The court also held defendant's argument about the need for the government to prove the victims must suffer individual harm had no merit. The court affirmed the district court's judgment. *United States v. Reynolds*, D.C. Cir., No. 11-3101, 3/26/13

Definition For Federal Health Care Fraud Statue Expansive

Defendant was the owner of a physical therapy clinic. Between 2003 and 2004 defendant and other employees committed insurance fraud by submitting false claims to providers of Massachusetts' no-fault automobile insurance and requesting payment for physical therapy they never rendered. Defendant was convicted of multiple counts of health care fraud and conspiracy to commit health care fraud. Defendant moved for acquittal claiming the government had failed to establish the defrauded insurance companies were "health care benefit programs" as required under the statute.

Defendant argued the insurance companies did not fall within the statutory definition of the term "health care benefit program" because they: 1) "did not serve as health insurance companies; 2) did not identify themselves as health insurance companies; and 3) covered medical expenses up to a maximum of $8,000 "if the victim did not have health insurance." The U.S. Court of Appeals for the First Circuit held the statute states "a health care benefit program is any public or private plan or contract…under which any medical benefit item, or service is provided." The court held there is "no room for the limited scope" the defendants seek and affirmed the convictions. *United States v. Gelin*, 1st Cir., No. 10-2340, 4/1/13

Reports Non-testimonial for Confrontation Clause Purposes

Defendant was charged and convicted of multiple crimes in connection with the murders of four people and the collection of the insurance proceeds from life insurance policies. At trial, the State presented a staff member of county medical examiner's office to testify about the results of one of the victim's autopsy, even though the autopsy was performed by another member of the staff. The State also had a medical examiner testify to the results of a forensic toxicology test conducted by a colleague. Defendants raised objections claiming each of these actions violated the Sixth Amendment's Confrontation Clause.

The U.S. Court of Appeals for the Second District held there was no error in admitting the records without the testimony of the person who prepared the report because the reports were non-testimonial. The court held the reports were non-testimonial because "they were not made with the primary purpose of creating a record for use at a criminal trial, and therefore did not require that the defendants have the opportunity to confront the authors of the reports." The conviction was upheld. *United States v. James*, 2d Cir., No. 09-2732, 3/28/13

Obstruction of Justice Upheld Because of Final Order

A district court granted a temporary restraining order (TRO) to safeguard assets in defendant's possession as a result of a civil action taken by the FTC. The TRO included an asset freeze provision prohibiting any "opening or causing to be opened of any safe deposit boxes titled in the defendant's name.

While the case continued and defendant filed an appeal, defendant became convinced one of his creditors was going to get access to his safety deposit box and so defendant emptied the box of the gold coins contained therein. The government was informed the box had been accessed and the government charged defendant with obstruction of justice.

Defendant argued his actions were not obstruction of justice because there was no court order precluding him from removing the contents of the box. He argued any

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restraints on him with respect to removing the coins were contained in a voluntary agreement between the bank and the FTC. The appellate court held there was a final court order and injunction explicitly preventing defendant from accessing his safety deposit boxes when he accessed the safety deposit box and removed the coins. The appellate court affirmed the conviction. *United States v. Sussman*, 3d Cir., No. 09-4023, 3/6/13

Improperly Obtained Warrant Sets Aside Plea

DEA agent Lunsford obtained a search warrant to search defendant's home and car using an affidavit with information from a confidential informant. The affidavit claimed the confidential informant told Lunsford defendant had a gun in his home and was selling drugs from his car and home. Using the search warrant, law enforcement searched the home and car, finding drugs and a handgun.

At trial, defendant made a plea agreement where he plead guilty to possession of a firearm by a felon. Defendant was sentenced to ten years in prison. While defendant was serving his sentence, Lunsford was charged with various fraud and theft offenses related to his duties as a DEA agent. Lunsford lied in his affidavit for the search warrant of defendant's home and car, claiming a confidential informant told him about defendant's criminal actions when the informant had nothing to do with the case.

Defendant filed a pro se motion seeking to have his guilty plea vacated because of the agent's criminal misconduct. Defendant argued his guilty plea was constitutionally infirm because Lunsford's underlying pre-plea misconduct rendered his plea involuntary under *Brady*.

The U.S. Court of Appeals for the Fourth Circuit held "To set aside a plea as involuntary a defendant must show: 1) some egregiously impermissible conduct; and 2) the misconduct influenced his decision to plead guilty. Here, the appellate court held defendant successfully showed the impermissible government conduct occurred and a reasonable probability that he would not have pled guilty had he known about Lunsford's criminal misconduct. The court held Lunsford's actions rendered defendant's actions involuntary and vacated defendant's plea, reversing the lower court. *United States v. Fisher*, 4th Cir., No. 11-6781, 4/1/13

No Right To Search Phone In School

Appellant attended Owensboro Public School as a non-resident because his parents lived outside of the county. After transferring there from his school he started to have disciplinary problems. Eventually, school officials informed appellant's parents he would be kicked out of school if he had any further disciplinary problems. Soon afterwards, appellant was caught texting in class, his cell phone was seized and brought to the principal (Brown). Brown read four text messages on the cell phone. Shortly afterwards, appellant was kicked out of school.

Appellant filed suit raising multiple claims and defendants moved for summary judgment, which the district court granted. Appellant appealed claiming, among other things, his Fourth Amendment rights were violated when Brown read text messages on his phone without the requisite reasonable suspicion. Defendants argue the search was reasonable in light of his documented drug abuse and suicidal thoughts. They also argue the searches were limited and aimed at uncovering any evidence of illegal activity or an indication the appellant might hurt himself.

The U.S. Court of Appeals for the Sixth Circuit held a student improperly using a cell phone on school grounds does not "automatically trigger" a right of officials to search the phone. The court held defendants did not have a reasonable suspicion to justify the search at its inception. The court reversed the district court's grant of summary judgment concerning the Fourth Amendment claim. *G.C. v. Owensboro Public Schools*, 6th Cir., No. 11-6476, 3/28/13

Officer's Question Not An Investigatory Question

A officer noticed defendant was speeding and followed the car to a parking lot. Defendant was out of the car when the officer arrived. The officer instructed defendant to get back in the car and put his hands on the steering wheel. Defendant got back in the car, but kept reaching for something in the passenger side of the car. Defendant was still not listening to the officer's commands and so the officer pulled defendant out of the car.

While the officers were arresting defendant the officer felt something hard in defendant's pocket and asked, "What is in your pocket?" Defendant responded he was "bogue," which meant he possessed illegal contraband. The officer, concerned defendant might be carrying a gun, asked whether the contraband was a gun or drugs. Defendant responded it was a gun. The officer then asked if it was on his person or in the car and defendant responded it was in the car. The officer then searched the car and found the gun and crack cocaine.

Defendant moved to suppress the evidence found in his car and the trial court denied the motion. Defendant appealed claiming

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his statement was inadmissible under *Miranda* and therefore the evidence was also inadmissible because it was "the fruits of the poisonous tree."

The U.S. Court of Appeals for the Sixth Circuit held the issue was whether defendant was subjected to a custodial interrogation. The court held the question, "What is in your pocket?," was not an investigatory question calculated to elicit an incriminating response, but rather a normal question during the course of an arrest. The court further held it would be illogical for the officer to have the right to physically search the defendant's pockets, but not to ask him what was in them. The court affirmed the conviction. *United States v. Woods*, 6th Cir., No. 11-2429, 4/3/13

Inoperable Gun Still considered Firearm

Defendant was arrested after assaulting the victim and pointing a pistol at her. He was charged and convicted for being a felon in possession of a firearm. The statue defines any firearm as "any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the frame or receiver of any such weapon." Defendant argued, on appeal, the pistol was not a firearm because it was inoperable and so, it was no longer designed to expel a projectile by the action of an explosion.

The U.S. Court of Appeals held the gun, even though it was inoperable, was "designed to be a gun, never redesigned to be something else, not so dilapidated as to be beyond repair, the gun fits the statutory definition." The court affirmed the conviction. *United States v. Dotson*, 7th Cir., No. 12-2945, 4/4/13

Reduced Sentence Unreasonable

Defendant owned multiple chiropractic offices in Georgia and Tennessee. Over a five-year period defendant operated an insurance fraud scheme where he would bill insurance companies for procedures that were not performed. Defendant stole around $3 million before the FBI arrested him.

Defendant paid full restitution of $3 million a few days before sentencing hearing. The U.S. Sentencing Guidelines recommended defendant serve a sentence of 57 to 71 months imprisonment for his crimes. The government recommended a sentence of only 36 months as part of a plea agreement. At the sentencing hearing, the judge allowed for a six month continuance to allow defendant to pay back his fine and support his family. The government objected claiming defendant would be allowed to go right back to his work, which is where the crime occurred.

Eventually the trial court sentenced defendant to probation for the "time served" while awaiting his sentence, citing his full restitution, community service and the rising costs of incarceration. The government objected arguing the sentence was unreasonable in light of defendant's crime.

The U.S. Court of Appeals for the 11th Circuit held the test for reasonableness, found in *Irey*, is:

"[a] district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors. As for the third way that discretion can be abused, a district court commits a clear error of judgment when it considers the proper factors, but balances them unreasonably."

When reviewing the factors of the reasonableness test the circuit court held it would only vacate a sentence if it had a "definite and firm conviction" there was a clear error. The circuit court quoted a sister court and held, "business criminals are not to be treated more leniently than members of the 'criminal class' just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity."

The circuit court held the sentenced did not "reflect the seriousness and extent of the crime, promote respect for the law, provide just punishment, or adequately deter other similarly inclined health car providers." The circuit court vacated the sentence and remanded for resentencing. *United States v. Kuhlman*, 11th Cir., No. 11-15959, 3/8/13

Missing Page of Evidence Available, Not a *Brady* Violation

Defendant was convicted of murder. Defendant filed a motion for a new trial and it was granted based on the unavailability of a piece of evidence that was available at the trial of a co-indictee who was acquitted. The unavailable evidence was the second page of the medical examiner's report, which the trial court called a "critical piece of evidence." The trial court held the lack of access to the missing page was a *Brady* violation.

The Georgia Supreme Court held that to prevail on a *Brady* claim four factors must be shown: 1) the State, including any part of the prosecution team, possessed evidence favourable to the defendant; 2) the defendant did not possess the favourable evidence and could not obtain it himself with any reasonable diligence; 3) the State suppressed the favourable evidence; and 4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense.

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Here, the court held there was no suppression of the evidence because the defense team was provided the report with clear pagination. The defense should have noticed a page was missing and requested the page before the trial. This is what happened with a co-indictee. The court held the defense cannot make a *Brady* claim based on their inaction to obtain the missing page which was readily available. The court reversed the trial court's grant of motion for new trial and reinstated defendant's conviction. *State v. James*, Ga., No. S12A1650, 2/18/13

Guaranteed Leniency Rendered Confession Involuntary

Defendant voluntarily went with Detective Bosco to discuss an investigation. Defendant was informed he was not under arrest and was free to leave the interview room at any time. Defendant was not ever informed of his *Miranda* rights. About forty minutes into the interview Bosco told defendant he could either "own up" to his mistake and serve "a little bit of jail time" in county jail close to his family or refuse and serve a sentence in state prison. Bosco guaranteed specific ways defendant's punishment would be lighter if defendant would tell the truth several times . When defendant asked if he needed a lawyer Bosco told him he couldn't make that decision for him and did not address it any further. After two hours, defendant described sexual contacts he had with the victim.

Defendant moved to suppress the statements made during the interview, but the trial court denied the motion holding defendant was not in custody during the interrogation and the confession was voluntary. Defendant was convicted of multiple counts of sexual crimes.

The Supreme Court of Maine held defendant was not in custody and the confession was not voluntary. The court held Bosco's statements about leniency were more specific and unconditional than what the court had allowed in the past. The court reversed the conviction and remanded the case for a new trial. *State v. Wiley*, Me., No. 2013 ME 30, 3/14/13

Search of Garbage Cans In Curtilage Illegal

Police received tips defendant was trafficking meth out of his home. However, surveillance did not result in any information. A detective decided to do a warrantless search of the garbage cans to obtain more information. The cans were on the driveway, in between the car and the home, "almost touching the siding of the house." The detective found a receipt for a scale and baggies with residue of meth inside them. The detective obtained a search warrant based on this evidence. A search of the home, found drugs and drug paraphernalia.

Defendant moved to suppress the evidence from the trash searches, and therefore any evidence found by the invalidated warrant, because they violated his fourth amendment rights and . The trial court denied the motion finding the trash searches to be legal. The appellate court reversed.

The Supreme Court of Kentucky held the trash searches were illegal. The supreme court held the trash cans were within the curtilage of the house and therefore, protected under the Fourth Amendment. The supreme court affirmed the court of appeals' decision. *Commonwealth v. Ousley*, Ky., No. 2011-SC-000403-DG, 3/21/13

Parole Mandated Therapy Privileged

Defendant was a convicted sex offender. As part of his parole conditions he was required to attend therapy. Defendant violated the terms of his parole on four different occasions and had been in and out of jail multiple times. After the last violation, the District Attorney tried to have him certified as a Violent Sexual Predator (VSP).

Leading up to the hearing to determine if defendant was a VSP, the state requested all of the records from his therapy sessions. Defense objected citing psychotherapist-patient privilege. The State argued both, the defendant waived his psychotherapist-patient privilege because his therapy was a condition of his parole and that the dangerous-patient exception allowed the State to put his therapist on the stand. The trial court allowed the State to have access to the records and have his therapist testify at the hearing about statements made by defendant during therapy sessions. The appellate court reversed.

The California Supreme Court held the waiver as applied to parole mandated therapy sessions only allows therapists to "provide limited type of general nonintrusive information to parole officials regarding the parolee's compliance with the parole condition." Furthermore, the court held, "requiring participation in therapy does not mean…all records and details of parole-mandated therapy may be provided to public officials without the parolee's knowledge and consent."

The California Supreme Court rejected the State's argument that whenever there is probable cause to qualify a defendant for a SVP hearing, the dangerous-patient

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exception authorizes the disclosure of the records and content of therapy sessions. The supreme court emphasized the State cannot go around the privilege using the dangerous patient exception unless waiver is initiated by a therapist's concerns for someone's safety.

However, the California Supreme Court still reversed the appellate court's decision holding there was no prejudice as a matter of law because the jury had enough damaging evidence that defendant was going to be considered a SVP anyway. *People v. Gonzales*, Cal., No. S191240, 3/18/13

Only Owning A Car Not Enough For Possession

A police officer saw four people sitting in a car and upon inspection saw a pistol on the lap of the passenger. Defendant testified he did not know the passenger was carrying the gun, even though he showed it to him earlier in the day. Defendant was the owner of the car and was convicted of carrying a firearm without a license under the constructive possession theory.

The Massachusetts Supreme Judicial Court held defendant did not possess the firearm under the constructive possession theory. The supreme court held there must be a particular link to the defendant to show possession when contraband is in a shared area. Furthermore, the supreme court held ownership of the vehicle and failure to affirmatively exclude the contraband is not enough of a link. The supreme court reversed the conviction. *Commonwealth v. Romero*, Mass., No. SJC-11149, 3/15/13

Defendant Allowed to Waive Attorney Conflict

Prosecution of defendant for murder started and he was assigned a public defender. While that case was ongoing, the State brought charges against defendant for perjury, asserting defendant purposefully did not report some of his assets to qualify for court-appointed counsel. The office supervisor of the public defenders was assigned to the murder defense case and was going to be called to testify against the defendant in the perjury case. The supervisor withdrew and agreed to be "walled off" from anything related to the murder case. However, the trial court disqualified two other public defenders and their entire office, finding they had a conflict of interest.

Defendant filed a motion seeking reconsideration of the disqualification ruling, but the trial court denied it. Defendant petitioned the Colorado Supreme Court to issue a rule to show cause why the district court's order should not be disapproved.

The Colorado Supreme Court held the conflict was merely potential, not direct, and did not cause any prejudice to defendant. The supreme court held when weighing matters of public faith in the courts versus defendant's right to choose to have the same attorney's throughout his case, defendant should be able to choose to keep his attorneys. The supreme court held disqualification was a harsh remedy and the defendant should be able to waive the conflict because his preferences for attorneys comes first. *In re People v. Nozolino*, Colo., No. 12SA189, 3/25/13

Speedy Trial Clock Resumes When Charges Are Brought Again

An arrest warrant and criminal complaint was issued for defendant in September 1991 for rape and unarmed burglary. However, defendant was never arrested and there were some bookkeeping mistakes made concerning the warrant. Then in 1993, while incarcerated on unrelated charges, defendant filed a form requesting a speedy trial. No action was taken because of the mistakes concerning the warrant. In 1997, the defendant was released from prison and another arrest warrant was issued three days later. Defendant was arrested and arraigned in 1998, but the victim was unavailable so the charges were dismissed without prejudice. Nearly one year later, the victim was located and defendant was arraigned for the original rape and burglary charges. Defendant's trial began in May of 2003, where he was convicted of a lesser charge of rape and acquitted of the burglary charge.

The Supreme Court of Massachusetts was faced with the question of whether the speedy trial clock resumes or resets when formal charges are brought, dismissed and brought again. The supreme court held the clock resumes when charges are brought again "otherwise, the government would be able to nullify a defendant's speedy trial right by the simple process of dismissing and re-indicting whenever speedy trial time was running out on its prosecution." The supreme court still affirmed the denial of a new trial because of other factors. *Commonwealth v. Butler*, Mass., No. SJC-11073, 3/26/13

"Opened The Door" No Exception to Admittance

Defendant was on trial for manufacturing meth when a witness testified they had manufactured and used meth together. In his defense, defendant called his parole agent to testify about how defendant had never failed a drug test and how often he was tested. During cross examination of the parole agent, the State introduced evidence defendant had a prior conviction for possession of drug paraphernalia to manufacture meth .

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Defendant was convicted and appealed arguing evidence of his prior conviction was erroneously admitted.

The Supreme Court of Kansas held its decision in *Gunby* controlled and ended the practice of "admitting evidence of other crimes or civil wrongs on any grounds independent of K.S.A. 60-455." The supreme court held there is no longer an "opened the door" exception to the admittance of evidence under Kansas law. The supreme court held all evidence must go through the three part test established in *Gunby*, which is used to determine whether to admit evidence of a defendant's prior crimes or civil wrongs. *State v. Everett*, Kan., No. 100,529, 3/29/13

Collateral Attack of Protection Order Not Allowed

Appellant lived in an apartment with the victim and her two kids. The apartment lease did not list appellant as a resident of the address. During an argument appellant hit the victim and was then arrested and jailed. The victim then contacted a domestic violence advocate organization over the phone and obtained a temporary protective order (TPO) against appellant. The TPO required him to stay at least 100 yards away from the victim's apartment, but for one time to return with a police officer to collect his personal belongings.

Appellant was served with the TPO while in jail. When he was released from jail and while the TPO was still valid, appellant went to the victim's apartment by himself and started knocking on the door. The victim called 911 and appellant kicked in the door and spoke to the victim while she was waiting for the police to arrive.

Appellant was charged with one count of invasion of a home in violation of a TPO. At trial, appellant argued the procedure for obtaining the TPO violated his due process rights, but his motion was denied. He was informed the parties could address the issue prior to sentencing as the constitutionality of a TPO was a question of law. Appellant was convicted and at sentencing did not file a motion with the district court regarding the TPO's validity.

On appeal, he claimed the TPO procedure violated his due process rights. The Supreme Court of Nevada held "a party must initially challenge the validity of a temporary protective order before the court that issued the order." The supreme court affirmed defendant's conviction. *Truesdell v. State*, Nev., No. 58628, 4/4/13

Calling Jurors By Number Not Prejudicial

Defendant was charged with sexual assault. During a pre-trial conference the trial court informed both parties the court would be addressing jurors by their jury number and not by name. The court stated it was doing this to respect the jurors privacy and had received positive responses from jurors in the past. Defendant objected claiming the practice implied defendant's guilt. The court overruled the objection and proceeded with the practice. However, the court explained the reason for the practice and instructed the jury on the presumption of innocence before allowing them to deliberate.

On appeal, defendant claimed his right to fair trial and presumption of innocence was undermined by the practice. The Colorado Supreme Court held the procedure did not prejudice the defendant because jurors had no reason to infer guilt. The supreme court held the jurors could only assume it was court policy because they were told it was done to protect their privacy, each party still received all the identifying information of each juror and the court gave instructions about the presumption of innocence. Rizo v. People, Colo., No. 11SC375, 4/8/13

Attorney Has Ultimate Authority To Decide Strategy

Defendant was on trial for first-degree murder. During the trial there was a disagreement about whether to call a witness, who was involved in the incident, to testify. The other witness gave multiple contradictory statements: some of them saying defendant was involved in the plan to kill the victim and others stating defendant was there, but did nothing.

Defendant's counsel decided it would be strategically better to not call the other witness because counsel did not have enough time to properly prepare for the witness's testimony. However, defendant felt the other witness should have been called to testify. The court gave deference to defendant's counsel holding counsel had the authority to make decisions that were not fundamental. Defendant appealed the decision of the district court stating there is an express and direct conflict from a different district court within the state.

The Florida Supreme Court held the question was whether a criminal defendant has the ultimate authority to decide whether to present witnesses at trial when the defendant is represented by counsel. The court held the decision to present a witness or not is not a fundamental decision and defense counsel has the final authority as to whether or not the defense will call a particular witness to testify at a criminal trial. The Florida Supreme Court upheld the district court's decision and affirmed defendant's conviction. *State v. Puglisi*, Fla., No. SC11-768, 4/11/13

***Miranda* Waiver Applied to Separate Cases**

Defendant was charged with various counts of kidnapping, sexual assault and conspiracy arising

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from a sexual assault committed by a number of assailants. Defendant was in jail when his DNA was found as a match for a rape that was unsolved. Police felt that the rape had a very similar fact pattern and so police were interested in speaking with him about it. Officers approached defendant, who did not have counsel present, with a DNA warrant to gather evidence and spoke with defendant about the parallel rape investigation. The officers obtained a *Miranda* waiver and questioned him about both crimes and eventually defendant gave statements about both crimes and DNA evidence.

The trial court suppressed both statements and evidence obtained by police when counsel was not present. The State filed an interlocutory appeal claiming defendant's Sixth Amendment right to assistance of counsel was not violated when he was questioned without counsel present. The Colorado Supreme Court held defendant's *Miranda* waiver "effectively waived his right to counsel as guaranteed by not only the Fifth , but also the Sixth" and the district court erred by suppressing the statements as a violation of the defendant's right to counsel. The supreme court reversed the suppression order and remanded the case to finish proceedings. *People v. Luna-Solis*, Colo., No. 12SA75, 4/8/13

"Not At The Moment" Was An Equivocal Invocation of Rights

Defendant was suspected of aggravated battery and held in an interrogation room at the police department. A detective advised defendant of his *Miranda* rights and asked if him if he understood his rights. Defendant responded affirmatively and the detective then asked him if he wanted to answer any questions. Defendant responded, "Not at the moment. Kind of intoxicated." The detective responded that intoxication was not a reason defendant could not talk to him and placed a waiver of rights form in front of him. The detective told him, "Sign this for me if you wish to answer questions," and showed him where to sign. Defendant stated, "If I wish to answer questions? Like I said, not at the moment." The detective then repeated that intoxication was not a reason to not talk to the detective and persisted in questioning. Defendant eventually made incriminating statements to the detective and moved to suppress the statements in district court. The district court granted the motion to suppress finding defendant twice unambiguously invoked his Fifth Amendment right to remain silent.

The New Mexico Supreme Court affirmed the district court's grant of the motion to suppress the statements. The supreme court held defendant clearly invoked his right to remain silent and even though his statement might have suggested he might want to talk later, there was no respite from the interrogation. These actions and the refusal to honor defendant's right to remain silent by ceasing the interrogation are a violation of the Fifth Amendment. *State v. King*, N.M., No. 33,395, 4/15/13

Statute Does Not Limit State To Evidence of One Conviction

Defendant was convicted of possessing of a firearm after being convicted of a violent felony. At trial, the Commonwealth offered one prior conviction for robbery and four prior convictions for burglary as evidence. Defendant objected to the evidence of the four convictions arguing the statute only allowed one prior conviction for a violent felony to be admitted. The relevant statute stated "…previously convicted of a violent felony."

The Virginia Supreme Court held the phrase "…previously convicted of a violent felony" does not limit counsel to introducing only one prior conviction. It "merely sets forth an additional element the Commonwealth is required to prove beyond a reasonable doubt to obtain an enhanced sentence." Furthermore, the supreme court held the commonwealth needs to create a record at trial that will preserve the integrity of the conviction being sought. However, the supreme court held a court may use discretion in limiting the convictions introduced into evidence. The supreme court upheld the conviction and affirmed the judgment of the court of appeals. *Boone v. Commonwealth*, Va., No. 121144, 4/18/13

Identity Theft Statute Protects Corporations

Defendant stole a business check from the business where he worked, made the check out to himself for $500. He then forged a signature on the check and cashed it. Defendant was convicted of identity theft. Defendant appealed claiming the identity theft statute criminalizes theft of a natural person's identity, but does not criminalize theft of a corporate identity.

The Washington Supreme Court rejected this argument holding the legislative history and plain language of the statute shows the statute was meant to protect corporate identities. There were versions of the statute that clearly included corporations and the newest version was meant to expand the statute to also protect the identity of dead victims as well as corporations. *State v. Evans*, Wash., No. 86772-1, 4/11/13

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

June 19-21	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE *Training for the non-attorney staff in prosecution offices*	Ruby's Inn Bryce City, UT
August 1-2	UTAH MUNICIPAL PROSECUTORS ASSN ANNUAL CONFERENCE *For city prosecutors and all others whose case load is largely misdemeanor*	Capitol Reef Resort Torrey, UT
August 19-23	BASIC PROSECUTOR COURSE *Trial ad and substantive legal instruction for new prosecutors*	University Inn Logan, UT
September 11-13	FALL PROSECUTORS' TRAINING CONFERENCE *The annual CLE event for all Utah prosecutors*	Riverwoods Logan, UT
October 16-18	GOVERNMENT CIVIL PRACTICE CONFERENCE *CLE for civil side attorneys from counties and cities*	Zion Park Inn Springdale, UT
November 20-22	ADVANCED TRIAL SKILLS COURSE *For felony prosecutors with 4+ years of prosecution experience*	Hampton Inn West Jordan, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

22 dates and locations around the country	INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME *This 2 day course will be held in 22 different locations throughout the country during 2013* Flyer Registration Lodging Scholarship Application	
June 10-12	THE PROSECUTOR AND THE MEDIA Agenda Registration Summary	Salem, MA
June 17-26	CAREER PROSECUTOR COURSE Flyer Registration Summary *Designed for those who have committed to prosecution as a career. Trial advocacy, leadership skills, and substantive legal training*	San Diego, CA
July 10-12	SPECIAL OFFENSES Agenda Registration Summary *Domestic Violence, Stalking, Sexual Assault for the Prosecution Team*	Topeka, KS
July 22-26	UNSAFE HAVENS II Agenda Registration Summary *Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children*	San Antonio, TX
July 24-27	ASSOC. OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION *For more information about and registration forms for the 2013 AGACL conference, visit www.agacl.com or call Susan Wilhelm at (512) 240-5486.* Agenda Conference FAQ Registration Hotel Registration	Liaison Capitol Hill Washington, DC

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July 29– Aug. 2	PROSECUTING HOMICIDE CASES *Covering all aspects of a homicide case; including investigation, case management, pre-trial and trial.*	Summary	Seattle, WA
August 12-16	TRIAL ADVOCACY I *HANDS ON trial skills training for newer prosecutors* Agenda Registration Summary		Danvers, MA
August 19-23	PROSECUTING SEXUAL ASSAULT CASES *Learn to address the unique issues in sexual assault cases: evidence, trial advocacy, victim issues, ethics, etc.* Agenda Registration Hotel Registration Summary		Denver, CO
September 9-13	PROSECUTING DRUG CASES *NDAA's popular course for narcotics prosecutors and investigators.*	Summary	Las Vegas, NV
September 23-27	STRATEGIES FOR JUSTICE *Advanced Investigation and Prosecution of Child Abuse and Exploitation*	Registration Summary	Atlanta, GA

*For a course description, click on the "Summary" link after the course title. If an agenda has been posted there will also be an "Agenda" link. Registration for all NDAA courses is now on-line. To register for a course, click on the "Register" link. If there are no "Summary" or "Register" links, that information has not yet been posted on the NDAA website.